

REDACTED VERSION*

Matter of: Engineering Design Group, Inc.

File: B-253066.3

Date: November 8, 1993

Christopher T. Corson, Esq., Pepper, Hamilton & Scheetz, for the protester.

Paul Brundage, National Aeronautics and Space Administration, for the agency.

Stephen J. Gary, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In procurement for facility support services, protest that agency improperly evaluated protester's and awardee's proposals is denied where record shows the agency's evaluation of the proposals was reasonable and in accordance with the solicitation's stated evaluation criteria.

2. There is no merit to protest that awardee engaged in improper "bait-and-switch" practices by proposing certain key personnel while intending instead to hire incumbent employees if awarded the contract: (1) awardee's proposal included resumes and negotiated salary information for the candidates; (2) the agency confirmed that the individuals were well qualified to perform the work; and (3) nothing in the record suggested that the names were submitted in other than good faith.

DECISION

Engineering Design Group, Inc. (EDG) protests the proposed award of a contract to Ameriko/OMSERV (AO) under request for proposals (RFP) No. 2-34844(SNP), issued by the National Aeronautics and Space Administration (NASA) for facility support services. EDG argues that NASA improperly evaluated

*The decision issued on November 8, 1993, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[deleted]."

cost and technical proposals and failed to hold meaningful discussions.

We deny the protest.

The RFP, issued on June 26, 1992, provided for facility support services for the NASA-Ames Research Center, Dryden Flight Research Facility, in California. The work was to include minor construction, maintenance, records management, and janitorial services. The solicitation was issued as a small business set-aside; it provided for award of a cost-plus-fixed-fee, level-of-effort contract, with a basic term of 3 years (April 1993 to March 1996), an option for 2 additional years, and an option for an additional 10-percent level-of-effort. Award was to be made on the basis of the proposal found to be most advantageous to the government under four major criteria: mission suitability (technical matters); cost; relevant experience and past performance; and other considerations. The most important factors were mission suitability (the only factor to be scored numerically) and cost, which were approximately equal in importance; experience and past performance were "somewhat less important," and other considerations were "considerably less important."

Five offers were received by the September 9 closing date, of which three (among them, EDG's) were included in the competitive range for initial evaluation by the Source Evaluation Board. In the mission suitability area, EDG's proposal was ranked lowest of the three with a score of 395, while AO's proposal was ranked highest, with a score of 884. Following discussions, EDG's score was revised upward to 516, while AO's was lowered to 859. The final scores were as follows:

Mission Suitability	AO	EDG	Max. Avail.
A. Understanding Requirement	478	291	530
1. Technical Understanding	276	141	300
2. Staffing and Training Plan	202	150	230
B. Key Personnel	230	148	300
1. Key Personnel	200	118	250
2. Backup/Replacement	30	30	50

C. Organ. Structure/ Mgmt. Approach	151	77	170
Total	859	516	1,000

Under the unscored evaluation factors, the proposals were given the following adjectival ratings:

	AO	EDG
Relevant Experience & Past Performance	Very Good	Very Good
Other Consid.	Good	Good

In the area of cost, NASA determined that AO's probable cost was \$24,308,231, and EDG's \$25,262,814. (The third offeror, DSS, Inc., was highest in cost but received a higher technical score than EDG.) Based primarily on AO's significantly higher technical rating, and also in view of its lower probable cost, the agency concluded that award should be made to AO. Following a debriefing on NASA's proposed selection, EDG filed this protest with our Office.

EVALUATION OF MISSION SUITABILITY

EDG challenges the evaluation of its and AO's proposals on numerous grounds. The evaluation of proposals and the determination of their relative merits is primarily the function of the procuring agency, since it is the agency that is responsible for defining its needs and the best method of accommodating them, and must bear the burden of any difficulties resulting from a defective evaluation. Dimensions Travel Co., B-224214, Jan. 13, 1987, 87-1 CPD ¶ 52. We therefore will review protests against allegedly improper evaluations only to determine whether the agency's judgment was reasonable and in accord with the evaluation criteria listed in the RFP. Taft Broadcasting Corp., B-222818, July 29, 1986, 86-2 CPD ¶ 125. We have considered all of EDG's arguments in light of the record and conclude that the evaluation was reasonable. We discuss the most significant evaluation arguments below.

Understanding the Requirement

EDG questions NASA's evaluation of proposals under the single most important mission suitability subfactor, understanding the requirement--technical understanding, for which EDG received a final score of 141 out of a possible 300 points, compared to AO's score of 276.

¹No award has been made pending resolution of this protest.

There was nothing objectionable in NASA's evaluation. Initially, NASA found EDG's proposal significantly inferior to AO's in this area, as reflected in EDG's initial score of 45, compared to AO's 288. Among other things, NASA found that EDG did not exhibit an understanding of the requirements of the solicitation's statement of work (SOW) pertaining to system implementation. As an example, the board noted that the proposal did not clearly identify EDG's [deleted] as required by the SOW. NASA considered these matters to constitute a "major weakness" in the proposal and raised them with EDG in the course of discussions. Following discussions, based on EDG's revised proposal, NASA reassessed this area as a "major strength" and increased EDG's score nearly 100 points, from 45 to 141 (compared to AO's final score of 276). However, NASA downgraded EDG's proposal for providing little or no information regarding critical plans requested in the SOW, such as fire protection and quality control plans. NASA also concluded that EDG's proposed work flow was not in accord with NASA's Facilities Maintenance Handbook, as required by the SOW, and that EDG's approach to meeting the work flow requirements of the SOW were not feasible.

AO's initial and final proposals, on the other hand, were found to reflect numerous major strengths. For example, the agency found that AO demonstrated an excellent understanding of the relationship between historical maintenance data and long range utilization and facility planning, and that maintenance data would be used to assist NASA in developing its facility utilization plan and long range master plan. NASA also viewed favorably AO's very detailed descriptions of the care to be given major maintenance items, which it believed showed a commitment to preventing deterioration that would, in turn, reduce the likelihood of emergency shutdowns. (NASA particularly noted AO's plans concerning roofing, foundations, electrical items, and uninterruptible power supply.) The agency also approved of AO's [deleted]. Noting that an effective CMMS was the cornerstone to the approach embodied in the Facilities Maintenance Handbook, NASA viewed as a major strength AO's plan [deleted]. NASA further concluded that the proposal demonstrated an in-depth understanding of SOW requirements in the area of system implementation, such as setting maintenance standards, analyzing and using maintenance schedule data, proposing a work classification system, and dedicating crews to trouble calls and small jobs. Based on these and other perceived strengths in meeting solicitation requirements, NASA

assigned AO a final score of 276 for this criterion, compared to EDG's 141.²

Aside from EDG's general disagreement with the evaluation in this area, EDG has raised only one specific objection to the agency's conclusions. Specifically, EDG claims that AO's CMMS was unproven and inferior to the one proposed by EDG, which already was in use at the NASA facility, and therefore should not have been considered a major strength. However, the solicitation did not require that the system already be in use and, moreover, EDG's proposal did not indicate that all RFP requirements could be met by its own system as currently configured. To the contrary, EDG's proposal stated that its system could meet all RFP requirements only with [deleted] and NASA concluded that EDG's existing system was capable of meeting the requirements of the solicitation only with the [deleted]. In any event, NASA's evaluators did not see any advantage in the fact that EDG's basic system was in use and AO's was not; rather, the agency considered the capabilities of the two systems to be more important. In this regard, the record shows the agency determined that the [deleted].

We think the agency's evaluation of this subfactor was reasonable. Although EDG disagrees with the agency's findings, it has not specifically rebutted them or put forward a detailed explanation as to why they were unreasonable or inconsistent with the stated evaluation criteria; we have found nothing in the record to indicate they were. Taft Broadcasting Corp., supra.

"Bait-and-Switch"

EDG contends that NASA improperly assessed AO's proposal as offering a major strength under the second most important mission suitability criterion, key personnel (under this criterion, worth a maximum of 250 points, AO received a final score of 200, compared to EDG's score of 118). According to EDG, AO engaged in an improper "bait-and-switch" tactic by proposing certain candidates while actually intending to hire other individuals currently employed by EDG (the incumbent contractor) if awarded the contract. To support its contention, EDG points to the statement in AO's BAFO that the firm intended "to interview

²AO's final score, however, was 12 points lower than its initial score. Although NASA found that AO's initial proposal demonstrated an extremely thorough understanding of the Facilities Maintenance Handbook, based on AO's responses to discussion questions, NASA downgraded its assessment of that understanding from "major strength" to "minor strength."

the incumbent personnel and then select the strongest team from the proposed candidates and incumbent personnel." According to EDG, since it was not possible to ascertain from AO's proposal whether the proposed individuals or personnel to be recruited from EDG would perform the contract, the agency had no basis for its favorable evaluation of AO's proposed key personnel.

Bait-and-switch practices, whereby an offeror's proposal is favorably evaluated on the basis of personnel that it does not expect to use during contract performance, have an adverse effect on the integrity of the competitive procurement system and generally provide a basis for proposal rejection. BMAR & Assocs., Inc., B-252273, June 16, 1993, 93-1 CPD ¶ 465. This does not mean, however, that in every case an offeror must use the personnel it has proposed or risk losing the contract for which it is competing. For example, where the offeror provides firm letters of commitment and the names are submitted in good faith with the consent of the respective individuals (that is, the offeror is not proposing personnel it has no intention of providing), the fact that the offeror later provides substitute personnel does not make the contract award improper. Id.; Professional Safety Consultants Co. Inc., B-247331, Apr. 29, 1992, 92-1 CPD ¶ 404; Informatics Gen. Corp., B-224182, Feb. 2, 1987, 87-1 CPD ¶ 105.

The record does not support EDG's allegations. AO's initial proposal designated 10 key positions for which it named specific individuals, 3 of whom were already employed by AO.³ The proposal stated that "all proposed personnel are committed to the project" should AO be selected for award, and stated the specific salary that had been negotiated with each individual. When, in discussions, NASA asked AO to verify that all proposed key personnel were still available and committed to the contract, AO replied in its BAFO that several candidates recruited from outside the firm were no longer available. AO explained that some proposed personnel had accepted other employment due to factors such as the considerable elapsed time since AO interviewed them for the positions, uncertainty as to whether AO would be awarded the contract, and their need to accept other employment when offered. AO concluded, however, that it did "not consider this to be a major problem because, in fact, we wish to offer incumbent employees who are acceptable to NASA the right of first refusal. Should

³In evaluating this subfactor, NASA considered the type of positions designated by the offeror as key and the rationale for such designations; the education, experience, and appropriateness of proposed personnel; and the level of commitment.

we be selected . . . incumbent employees would be our first choice, with outside candidates employed only in positions we could not fill from within."

NASA's evaluators construed the above response to mean that, to the extent that AO's proposed candidates should no longer be available, AO would give serious consideration to qualified incumbent employees as potential replacements for those individuals. In that regard, while AO's BAFO provided substitutes for two key individuals it had proposed in its initial proposal who were no longer available, neither of the individuals was an employee of EDG. After reviewing their resumes, NASA concluded that the two new candidates were equivalent substitutes; however, the agency downgraded the firm's BAFO for failing to provide a replacement for a third original candidate who was no longer available.⁵ Overall, NASA found nothing in the proposal to suggest that AO intended systematically to substitute incumbent employees for its proposed candidates, who reflected "an outstanding mixture of applicable experience and education." Based on this favorable assessment, the agency assigned AO's final proposal a score of 200 for this subfactor, out of a possible 250 points. (EDG, on the other hand, received a score of 118, based in part on NASA's perception that the firm had failed to provide an adequate rationale for designating a number of individuals as key personnel.)

We think NASA's conclusions were entirely reasonable. AO's statements indicating it would give serious consideration to hiring incumbent employees did not negate the agency's specific finding that the individuals it proposed were capable of and committed to performing the contract in their own right. EDG does not contend, and there is nothing in the record to suggest, that the individuals actually proposed lacked the requisite experience and education; nor is there any evidence that the individuals proposed by AO and evaluated by NASA were not committed to performing the contract, or that AO intended to rely, not on these individuals, but on substitutes, to perform the work. See Laser Power Technologies, Inc., B-233369; B-233369.2, Mar. 13, 1989, 89-1 CPD ¶ 267 (agency reasonably concluded that,

⁴Similarly, in response to a question concerning its cost proposal, discussed below, AO stated its belief that "retaining a very high percentage of incumbent personnel is very advantageous to contract operations, especially in providing continuity. . . . Incumbent personnel will be given job preference provided they are qualified, willing to work for the [firm], . . . and fit the staffing plan."

⁵AO's proposal was downgraded in this area from an initial score of 213 to a final score of 200.

although incumbent personnel might accept positions with awardee, fully qualified personnel proposed by awardee were committed to perform the contract); see also BMAR & Assocs., Inc., supra (awardee's approach to key personnel, based in part on recruiting incumbent contractor's employees, not indicative of bait-and-switch).

Further, the record shows that AO's statements and actions were not consistent with an attempted bait-and-switch. As noted above, AO did not attempt to conceal its interest in incumbent employees, but explicitly stated its intent to recruit them if appropriate. Similarly, AO demonstrated its good faith by advising the agency of substitutions that proved necessary at the earliest opportunity--that is, when it submitted its BAFO. See Laser Power Technologies, Inc., supra (awardee that forthrightly stated its plans to hire incumbent employees clearly was proposing key personnel in good faith rather than employing bait-and-switch); Professional Safety Consultants Co. Inc., supra (bait-and-switch allegation denied where record showed awardee reasonably expected proposed employees to be available and promptly notified government when they became unavailable). We therefore find no basis for EDG's allegation that AO was engaging in an improper bait-and-switch. Id.

IMPROPER COST EVALUATION

EDG challenges the agency's determination that AO's probable cost was lower than EDG's. According to the protester, while AO's "lower wage levels were the principal reason that it was able to bid lower than EDG," NASA failed to determine whether AO realistically could pay lower wages in view of AO's intention to "hire mostly incumbent staff."

When agencies evaluate proposals for the award of a cost-reimbursement contract, an offeror's proposed estimated costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR § 15.605(d); PAE GmbH Planning and Constr., B-250470, Jan. 29, 1993, 93-1 CPD ¶ 81. Consequently, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. CACI, Inc.--Fed., 64 Comp. Gen. 71 (1984), 84-2 CPD ¶ 542. Because the contracting agency is in the best position to make this cost realism determination, our review of an agency's exercise of judgment in this area is limited to determining whether the agency's cost evaluation was reasonable. General Research Corp., 70 Comp. Gen. 279 (1991), 91-1 CPD ¶ 183.

As an initial matter, the record is clear that NASA selected AO primarily because it made a determination--reasonably, as explained above--that the firm's technical proposal was significantly superior to EDG's, not on the basis of AO's lower probable cost. In this regard, both the proposed and the probable (adjusted) costs for the offerors were relatively close, compared to the disparity in their technical ratings. AO initially proposed the lowest cost (\$23,912,760), and EDG the second lowest (\$25,146,090); after NASA made adjustments for probable cost, the cost difference was narrowed: \$24,308,231 for AO, compared to \$25,261,814 for EDG.⁶ In view of the large disparity in the technical ratings compared to probable cost, it is likely that EDG was not prejudiced by any alleged deficiencies in the agency's cost evaluation. See D.O.N. Protective Servs., Inc., B-249066, Oct. 23, 1992, 92-2 CPD ¶ 277 (although protester's proposal was found to have slightly lower probable cost, agency reasonably based award on determination that awardee's proposal offered substantial technical advantages); Science Applications Int'l Corp., B-232548, B-232548.2, Jan. 23, 1989, 89-1 CPD ¶ 52 (even if protester were correct that its evaluated cost should have been found lower than awardee's, award decision likely would not have been affected in view of awardee's significant technical advantage).

Nonetheless, we have examined EDG's contentions on the merits and conclude that NASA's cost evaluation was reasonable. In assessing AO's proposed wages, the record shows, NASA systematically adjusted AO's proposed wage rates for non-key positions to reflect incumbent wage rates, where it could do so. (In determining the incumbent's wage rates, NASA relied on information provided by EDG in its proposal and in responses to discussion questions.) NASA did not make such adjustments for those non-key positions proposed by AO for which no counterpart could be found in EDG's proposal--that is, those positions for which no incumbent wage rate existed. Similarly, NASA made no adjustment for non-key positions that clearly were not to be filled with incumbent employees, or for key positions, which, as explained above, NASA had determined would be filled by AO's named candidates, not with incumbent employees. The categories of employees for which no adjustment was made accounted for more than half the difference between AO's and EDG's probable direct labor costs. For all other positions, NASA adjusted AO's proposed wage rates to reflect wage rates currently being paid by EDG, the incumbent.

⁶DSS, Inc., the third offeror, had the highest proposed and probable costs.

In our view, despite EDG's disagreement with the results, the methodology used by NASA provided a reasonable basis for assessing probable wage costs, by (1) substituting incumbent wage rates for those proposed by AO where appropriate; and (2) otherwise accepting the rates proposed by AO after reviewing them for realism. With respect to key personnel, for example, although EDG challenges NASA's acceptance of the indicated salaries in determining AO's probable cost, there is no basis for questioning such reliance in view of our determination above that NASA properly considered these candidates to be the individuals who would perform the work.

MEANINGFUL DISCUSSIONS

EDG asserts that NASA failed to discuss areas of its proposal which the agency had identified as having major weaknesses under the most important mission suitability criterion, technical understanding. Since, according to EDG, NASA did not ask any questions concerning those areas, the agency failed to fulfill its obligation to provide meaningful discussions.

While agencies are required to conduct meaningful discussions with all offerors whose proposals are within the competitive range, 10 U.S.C. § 2305(b)(4)(A)(i) (Supp. IV 1992); Federal Acquisition Regulation (FAR) § 15.610; Jaycor, B-240029.2 et al., Oct. 31, 1990, 90-2 CPD ¶ 354, an agency's failure to point out a perceived weakness in a firm's proposal does not provide a basis for sustaining a protest where the protester was not prejudiced by the omission; that is, if the award decision would not have been affected. See QAO Corp., B-228599; B-228599.2, July 13, 1988, 88-2 CPD ¶ 42.

In view of our determination above that there was nothing objectionable in NASA's substantive evaluation of mission suitability or probable cost, EDG was not prejudiced even if, as alleged, NASA failed to provide adequate discussions in this area. Even if EDG had received the maximum available score for the understanding the requirement criterion, raising its overall score by 159 points to 300, EDG's total mission suitability score (675) then still would have been significantly lower (by 184 points) than AO's final score; that is, any further discussions in the area complained of by EDG could not have altered the mission suitability rankings. Accordingly, we conclude that the protester was not prejudiced by any failure on the part of NASA to discuss more fully these areas of its proposal. QAO Corp., supra (even where agency fails to point out weakness there is no prejudice to protester if final award selection would not have been altered).

EDG raises other objections to the selection decision but, as in the areas discussed above, our review of the record discloses no evidence of impropriety.

The protest is denied.

James F. Hinchman
General Counsel